No. 14,749

IN THE

United States Court of Appeals

For the Ninth Circuit

GRIFFEN BUICK, INC., a corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of General Grant Greer, Jr., Deceased,

Appellee.

GRIFFEN BUICK, INC., a corporation, and J. W. NATION,

Appellants,

vs.

LONDON EVANS, Administrator of the Estate of Rubby Greer, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

This is a consolidated appeal by the defendants, Griffen Buick, Inc., an Arizona corporation, and J. W. Nation, from two judgments of the United States District Court for the District of Arizona in

actions for damages for the deaths of General Grant Greer, Jr., and Rubby Greer. The decedents were killed in an automobile accident on Highway 80 in Arizona. The actions were brought by the California administrator of the two decedents. They were consolidated for trial and were tried before the District Court, Honorable Dave W. Ling presiding, without a jury. The complaints charged, and the District Court found, that the accident was caused by the wilful and wanton misconduct and negligence of defendant Nation in the operation of a tow truck owned by defendant Griffen Buick, Inc. Nation was an employee of the corporation and was acting in the course of his employment.

JURISDICTION.

The plaintiff-appellee adopts the statement of jurisdiction contained in the brief of appellants.

STATEMENT OF THE CASE.

The appellants' statement of the case is inaccurate because it sets forth the evidence in the light most favorable to them and ignores the evidence which supports the judgments.

The accident occurred on December 23, 1952 (p. 48),* on Highway 80 about seventeen miles east of Yuma, Arizona. (p. 49.) The defendant Nation re-

*All such references are to pages of the transcript.

ported that the accident occurred at about 10:15 P.M. (p. 68), but the Highway Patrol officer did not receive the call until 10:40 P. M. (p. 48.) Three vehicles were involved, a truck tractor and semi-trailer operated by one Zektzer, a GMC wrecker or tow truck driven by the defendant Nation, and a Buick sedan which the decedents, Mr. and Mrs. Greer, occupied. (pp. 49, 62.) As appellants concede (Brief of Appellants, p. 20), there was no direct evidence as to who was driving the Buick automobile. It was owned by a church. (p. 62.) At the time of the accident the defendant Nation was attempting to tow or winch the tractor and semi-trailer onto the highway in order to bring that equipment into Yuma. Nation was employed by Griffen Buick, Inc., as a tow truck driver and he was in the course of his employment at the time. (pp. 87-89.) The tow truck was owned by defendant corporation.

As will be more fully shown, at the time of the accident the Zektzer truck was parked about four feet off the north edge of the highway, facing west, while the tow truck was stopped on the highway in the westbound lane, but facing east. The Buick car, proceeding west toward Yuma, came around a curve, started to pass to the right of the tow truck, but sideswiped the tow truck as the Buick started to go off on the shoulder. The Buick then struck the rear end of the Zektzer semi-trailer.

The defendant Nation testified that Zektzer came to Griffen Buick's place of business on the evening of December 23rd and stated that his truck had

broken down on the highway about fifteen or sixteen miles east of Yuma. (p. 88.) Zektzer asked Nation to come out and tow his truck into Yuma. (p. 88.) Nation drove Zektzer out to the disabled truck; they left Yuma about 9:30 P.M. and arrived at the scene "around ten o'clock, maybe a little before, a little after". (p. 89.)

Nation testified that the Zektzer truck was about three or four feet off the road, facing west, parallel to the westbound lane on the north side of the highway. (p. 90.) According to Nation, the truck was not stuck in the sand, but could have pulled itself back onto the highway if its engine had been working. (p. 89.) Nation made a U-turn on the highway and pulled in front of the tractor and semi. (pp. 89-90.) At that time there were no warning signals of any kind at or about the disabled truck. (p. 91.) Nation claimed that he set out two fusees; one was supposed to be about 100 yards to the east of the semi-trailer on the north side of the road on the shoulder (pp. 90-91); the other one was supposed to have been set out about 100 yards to the west of the truck on the north shoulder. (p. 91.) Nation also claimed that he put out round reflectors about even with each fusee, but on the highway about eight to nine feet north of the center line. (p. 92.) He admitted that no flare pots or red lanterns were set out. (pp. 92-93.)

Nation's testimony, however, was completely discredited and the District Judge was entitled to disregard it because Nation had given an almost entirely

different statement to the Highway Patrol officer who investigated the accident. Officer Cochran testified that Nation had told him the following: He stated that he had been called to pull the semi out of the sand, that it got stuck off the road in the deep sand, that he had attempted to pull it out in a southwesterly direction, but had succeeded in putting it deeper into the sand, and then had reversed the procedure and went to the back of the semi, hooking onto the back of it, and had almost got it back out of the sand where he could drag it back up the road. (p. 65.) Nation also told the officer that he had put out burning fusees, one being about 100 yards east of the point of impact. (p. 66.) The officer determined that *there was no other type of warning* in addition to the fusees at the scene of the accident. (p. 68.) The officer also testified that Nation told him that the fusee to the east of the accident scene had been run over by the Buick or by some other car close behind it and that the original fusee had been replaced by a new one which was burning when the officer arrived at the scene. (pp. 66-67.) However, on the night of the accident and the next morning the officer made a search for a damaged or run-over fusee and he could not find one. (p. 67.) Hence, the District Judge, as the trier of fact, was entitled to find that Nation's testimony was not true and to find particularly that there had been no fusee at all placed out to the east of the point of the accident until after the accident occurred.

Moreover, the fusees which Nation claimed to have used were the type which burn out in about fifteen

to twenty minutes. (p. 91.) If, as Nation claimed, he arrived at the scene about 10:00 P. M. and the accident occurred at about 10:15 P.M., the District Judge had good reason to believe that any fusee put out originally would have been extinguished by the time the accident happened. His belief would be further supported by the fact that the accident probably happened later than 10:15 P.M., since the Highway Patrol did not receive the call until 10:40 P. M. (p. 48.)

Nation further testified that he first hooked the cable of the tow truck to the front of the truck tractor and tried to tow it, but was unsuccessful. (p. 93.) He then tried to winch the truck equipment out from the front. (p. 93.) He stated that he had his "foot on the brake in the truck all the time the motor was running" to keep the tow truck from rolling back while the winching operation was going on. (p. 93.) Nation claimed that he could not winch the truck tractor and semi out from the front because the slope was steeper there. (p. 94.) He then unhooked his cable and pulled around to the rear to a point where the rear of the tow truck was about thirty feet from the rear of the semi. (p. 95.) He hooked onto the semi-trailer and, using the winch, moved it about two feet when he saw the Buick car coming. (pp. 95-96.) At that time, according to Nation, the Zektzer equipment was about four feet off the highway facing in a westerly direction. (p. 97.) There was some thirty feet of cable between the rear of the semi and the rear of the tow truck. (p. 97.) The tow truck was

on the highway, facing east in the westbound lane, with its right front wheels about three feet from the center line of the highway. (p. 97.) The position of the tow truck on the wrong side of the highway was such that a westbound car (such as the decedents' Buick) would have to cross the white center line into the eastbound lane in order to pass around the tow truck. (p. 109.)

With his tow truck standing on the highway, headed east in the westbound lane, and almost entirely blocking the westbound lane, the defendant Nation did not even turn on his headlights until after he had seen the decedents' Buick approaching. Prior to that time he had only his parking lights on. (p. 97.) He put on his headlights for the first time after he saw the Buick. (p. 107.) At the coroner's inquest the defendant Nation testified that he first saw the Buick when it was only 150 yards away from the tow truck and that he "had time to flash my lights on and off to try to get the attention of the driver" of the Buick. (pp. 106-107; see Exhibit 20.) In stating that he flashed his lights on and off, he was referring to his headlights. (p. 107.) That was the first time he ever pulled on his headlights. (p. 107.)

At the trial of these actions, however, Nation changed his testimony completely and testified that he saw the decedents' car when it was a half mile to three quarters of a mile away. (p. 96.) No explanation ever was offered for this change of testimony.

Nation also claimed that at the time of the accident all of the lights on Zektzer's truck and semi-trailer

were on (p. 96) and that the two boom lights (one red and one white light) on the back of the tow truck were lit. (p. 100.) The boom lights, however, faced in the opposite direction—to the west—although they were on a swivel and could have been turned to face to the east in order to illuminate the tow car. (p. 101.) Nation's testimony in this respect also was contradicted by officer Cochran. He testified that he noticed the lights on the boom of the tow truck, but he did not recall seeing those lights burning. (p. 77.) The officer also testified that he did not recall the lights of the Zektzer truck being on when he was there. (p. 84.)

The defendant Nation testified that when the Buick car was a half mile away he estimated its speed at 100 miles per hour. (pp. 102, 105.) Nation was then seated behind the steering wheel of the tow truck with his motor running (p. 104), but he made no attempt to back up off the highway (p. 103), although he observed that the Buick was not slowing up and he knew that the driver of the Buick was completely unaware of the danger (p. 104), and notwithstanding the fact that he had some twenty seconds or more within which to take action. (pp. 105, 142.) As the Buick approached, its driver kept to the right of the tow truck. The accident happened on a curve (p. 108) and the tracks left by the Buick show that it came directly off the curve without swerving. (p. 72.) The tire marks of the Buick were forty-four feet long from the point where it first began to leave the pavement. (p. 79.) The Buick was about twenty feet to the east of the tow truck when it first went onto the

shoulder. (p. 81.) The left side of the Buick sideswiped the left side of the tow truck (pp. 71-72, 103) and the Buick continued on and struck the rear of the semi-trailer. (p. 63.) Mr. and Mrs. Greer died in the accident (p. 63), leaving seven children who reside in Berkeley, California. (p. 110.)

It is apparent, and the District Judge was entitled to find from the evidence, that the driver of the Buick car was misled and, in fact, literally trapped by the deceptive situation created by the defendant Nation; that the Buick driver saw the tow truck suddenly and at the last moment as the Buick came around the curve, that because of the curve and the position of the tow truck it appeared that the tow truck was proceeding east in its own lane, that the Buick driver kept to the right to pass the tow truck on the right, but realized too late, as the car started to go off on the shoulder, that the tow truck was actually blocking the westbound lane.

At the point of the accident the highway curves to the right as a vehicle proceeds west. (pp. 67-68.) Also, in approaching the point of the accident from the east going west, there is a knoll or sand hill to the right side of the road at a point just prior to reaching the accident scene. (p. 53.) The knoll is about fifteen feet high. (p. 67.) Officer Cochran testified that the knoll would have completely hidden any view of the Zektzer truck outfit on the shoulder as a person approached it from the east, going west. (pp. 83-84.) He estimated the distance during which any view of that truck would have been completely hidden as being from a

point a quarter of a mile to a point 150 yards east of the point of the accident. (p. 84.) In other words, as the Buick approached the scene of the accident, because of the knoll the driver could not have seen the Zektzer truck outfit on the shoulder of the highway at any time from a quarter mile away until the driver was within 150 yards of the truck.

The testimony of the defendant Nation as to the speed of the Buick was incredible and the District Judge was more than justified in disregarding it for a number of reasons. Nation claimed that he saw the Buick when it was a half mile to three fourths of a mile away; that he watched it for a second and determined its speed "within a matter of a second" (p. 96), although the Buick was then about a half mile away and it was nighttime. Later in the trial, when he was recalled as a witness by his own counsel, the defendant Nation testified that he based his estimate of the Buick's speed in part upon the whine of its tires. (p. 136.) He claimed that he could hear the sound of the tires when the Buick was a half mile away, although he was sitting in the cab of the tow truck with the motor and the winch running. (p. 140.) His testimony at the trial was completely contrary to his testimony at the coroner's inquest to the effect that he first saw the Buick when it was only 150 yards away. (pp. 106-107; see Exhibit 20.) Nation's testimony was also contrary to defendants' own evidence to the effect that the Buick traveled the last 274 miles leading up to the accident at an average speed of only about forty-seven miles per hour. (p.

145.) An undisclosed portion of this distance was traveled during the daytime, during which there is no *prima facie* speed limit in Arizona.

The only other evidence offered as to the speed of the Buick was an alleged statement by an unknown and unidentified "colored sailor" to the effect that the Buick had passed him down the road while he was doing seventy miles per hour. Of course, this was incompetent hearsay of the worst kind. While the record is not entirely clear, we understand that the District Court so ruled. (pp. 138-139.)

It is significant that the exaggerated claims of high speed on the part of the other car, as is not uncommon, are made with the knowledge that the occupants of that car are dead and cannot refute them. Under such circumstances, the decedents were entitled to the presumption that they were using due care, as will be shown.

SUMMARY OF ARGUMENT.

The District Court found that the defendant Nation was guilty of wilful and wanton misconduct and negligence which was the sole proximate cause of the accident and deaths and that the decedents were not guilty of contributory negligence. (pp. 19-21, 23-25.) Defendants-appellants contend, in substance, that these findings were without any support in the record, or, otherwise stated, that *as a matter of law,* the defendant Nation was free from negligence and the

decedents, or one of them, was contributorily negligent.

The issues of negligence and contributory negligence in this case, as in most cases, were issues of fact which were reasonably resolved by the District Court contrary to defendants. The decision of the trial court is supported by substantial evidence and, therefore, must be sustained.

There is ample evidence that the defendant Nation was negligent in several particulars. He violated several Arizona statutes, which violations were the proximate cause of the accident, or, at least, the trier of fact was entitled so to find. Irrespective of statutory violations, the trial judge was entitled to find from the evidence that Nation's conduct was negligent in the manner and means by which, and under the circumstances in which, he attempted to conduct the towing operation.

Similarly, the District Court could reasonably find, under the evidence as a whole, that the defendants had failed to sustain their burden of proving contributory negligence or sole negligence on the part of the decedent, Mr. Greer. Moreover, the evidence clearly supports the view that defendants were liable under the doctrine of last clear chance. In any event, there being evidence supporting the finding that Nation's conduct was wilful and wanton, contributory negligence was not available as a defense.

ARGUMENT.

I

THE JUDGMENTS MUST BE AFFIRMED IF THEY ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is a universally accepted rule that negligence and contributory negligence are generally factual questions to be determined by the jury or by the trial Court when a jury is waived. If there is any substantial evidence to support the verdict of the jury or the decision of the trial Court on these questions, then the verdict or decision must be sustained on appeal.

Article 18, section 5, of the Arizona Constitution provides:

> "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."

Thus, under Arizona law, the defense of contributory negligence is *always* a question of fact, while the claim of negligence is ordinarily a factual matter. (*Pearson & Dickerson Contractors, Inc. v. Harrington* (1943), 60 Ariz. 354, 137 P. 2d 381, 382; *Butane Corporation v. Kirby* (1947), 66 Ariz. 272, 187 P. 2d 325, 330.) The dubious decision in *Herron v. Southern Pacific Co.* (1930), 283 U.S. 91, 75 L.Ed. 859, 51 S.Ct. 383, holding that the Arizona constitutional provision did not apply to a federal Court sitting in Arizona, would appear to be in direct conflict with the rule in diversity cases subsequently announced in *Erie R. Co. v. Tompkins* (1937), 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194, 114 A.L.R. 1487, where it was held that:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

In any event, the federal Courts have recognized the general rule that negligence and contributory negligence are normally factual matters. (*City of San Diego v. Perry* (1941), 9th Cir.), 124 F. 2d 629, 632; *United States v. De Back* (1941, 9th Cir.), 118 F. 2d 208; *Andruss v. Nieto* (1940, 9th Cir.), 112 F. 2d 250, 252.) The power and duty of determining the weight of the evidence, as distinguished from the existence of any evidence, "belongs exclusively to the trial judge." (*Southern Pacific Co. v. Guthrie* (1951, 9th Cir.), 186 F. 2d 926, 932-933.) Particularly is this true where questions of credibility are involved. (*National Labor Relations Board v. Dinion Coil Co.* (1952, 2nd Cir.), 201 F. 2d 484, 487.) Where a jury is waived, the decision of the trial Court has the same effect as the verdict of a jury, and the appellate Court cannot pass upon the weight of evidence; in such a case, the only question reviewable on appeal, with regard to the sufficiency of the evidence, is the question of whether the trial Court's decision was wholly without evidence to sustain it. (*McCaughn v. Real Estate Land Title & Trust Co.* (1935), 297 U.S. 606, 608, 80 L.Ed. 879, 881, 56 S. Ct. 604.)

It follows that the judgments in the present cases can be reviewed only to the extent of determining whether or not they are wholly without evidentiary support.

II

THERE IS SUBSTANTIAL EVIDENCE THAT NEGLIGENCE OF DEFENDANT NATION WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

A. There is ample evidence that Nation negligently violated several applicable statutes.

The pertinent Arizona rule is stated as follows in *City of Phoenix v. Mullen* (1946), 65 Ariz. 83, 174 P. 2d 422, 424:

> "We are committed to the doctrine that if the proximate cause of an injury to another is the failure of the driver to comply with the positive direction of the statute relating to the operation of a motor vehicle, such failure or violation is negligence per se and actionable negligence."

Whether or not the statutory violation was a proximate cause of the injury is generally a question of fact. (*City of Phoenix v. Mullen, supra; Southwestern Freight Lines v. Floyd* (1941), 58 Ariz. 248, 119 P. 2d 120, 125.)

The defendant Nation was stopped on the highway, headed east in the westbound lane, and almost entirely blocking the westbound lane, at about 10:00 o'clock at night, without his headlights burning; the only lights burning on the front of the tow truck were the parking lights; he did not turn on his headlights until after he saw the Buick and then he just flashed them. (pp. 97, 106-107; see Exhibit 20 at page 17 thereof.) It must be conceded that such conduct was in violation of the Arizona statutes requiring headlights to be lighted on vehicles on the highway at all times from a half hour after sunset to a half hour before sunrise.

(Arizona Code Annotated, 1939, 1952 Supplement, secs. 66-173a, 66-174g.) Such conduct has been held to be negligence per se in similar cases. (*St. Johnbury Trucking Co. v. Rollins* (1950), 145 Me. 217, 74 A. 2d 465, 466; *Winder & Son, Inc. v. Blaine* (1940), 218 Ind. 68, 29 N.E. 2d 987; *Herzberg v. White* (1937), 49 Ariz. 313, 66 P. 2d 253, 256.) As pointed out in the annotation in 21 A.L.R. 2d 7, at 63, citing many cases:

> "Parking or cowl lights have generally been held to be an ineffective substitute for the headlights required by statute . . ."

The trial Court was entitled to find that the conduct of the defendant Nation was also in violation of Section 66-171(a) of the Arizona Code Annotated, 1939, 1952 Supplement, which provides:

> "Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of 200 feet in each direction upon such highway."

Appellants seek to overcome the effect of this statute by stating, without referring to the record, as follows (Appellants' Brief, p. 16):

> "It was not only impracticable but impossible for Nation to perform his towing from any position except the position he occupied upon the highway."

This statement is without support in the evidence. Nation first attempted to tow and then to winch the Zektzer truck outfit from the front. (p. 93.) He testified that at that time the tow truck was almost entirely off the highway; the left front wheel was probably on the highway a little bit, but the other three wheels were off the highway. (Deposition of Nation, p. 22, Exhibit 22.) It was not until Nation went to the rear of the Zektzer outfit that his tow truck was stopped on the highway. He offered no explanation as to why he stopped on the highway at that time. In fact, no attempt was made to show that it was not "practicable to stop, park, or so leave such vehicle off such part of said highway." The only reason given by Nation for attempting to tow the equipment from the rear was his statement that the slope of the highway was steeper in the front. (p. 94.) If, as Nation told Officer Cochran, the truck was not disabled but was simply stuck in the sand (p. 65) and if the shoulder of the highway was of sufficient substance to support the tow truck when it was in front of the Zektzer equipment, there would appear to be no good reason why the tow truck had to block the westbound lane of the highway at the time of the accident. Under these circumstances, it was at least a question of fact as to whether or not Nation violated the statute. (See, e.g., *Salt River etc. Association v. Green* (1940), 56 Ariz. 22, 104 P. 2d 162, 164.)

Nor was there any showing that Nation "was making a proper and necessary use of the highway under an emergency" as was the case in *Kastler v. Tures* (1926), 199 Wisc. 120, 210 N.W. 415, 417, cited by appellants. In that case there had been an accident and there was a wrecked car in a ditch with the passengers in it. Moreover, the Wisconsin Court pointed out that (210 N.W. 415, at 417):

> "It is admitted that there was ample room for cars going in either direction to pass on this cement highway."

In our case it is admitted that the tow truck almost completely blocked the westbound lane. Its right front wheels were about three feet from the center line (p. 97) and a westbound car would have to cross the center line into the eastbound lane in order to pass it. (p. 109.) Furthermore, there was no emergency. The Zektzer equipment was either stuck in the sand, according to Nation's initial story, or its engine was disabled, according to the story Nation subsequently gave. In either event, there was no showing of any imperative necessity of blocking the highway in the middle of the night in order to extricate the truck.

The evidence also would support a finding that the defendant Nation violated Sections 66-182 and 66-182a of the Arizona Code Annotated, 1939, 1952 Supplement. Those sections provided, in substance, as follows: Every operator of a motor truck upon any highway outside a city at nighttime shall carry in such vehicle at least three flares or three red electric

lanterns and at least three red-burning fusees unless red electric lanterns are carried. Whenever any motor truck is disabled upon the traveled portion of any highway or the shoulder thereof outside a city at night, a lighted fusee shall be immediately placed on the roadway at the traffic side of the vehicle unless electric lanterns are displayed. Within the burning period of the fusee and as promptly as possible three lighted flares (pot torches) or three electric lanterns shall be placed on the roadway; one at a distance of approximately 100 feet in advance of the vehicle, one at a distance of approximately 100 feet to its rear, each in the center of the lane of traffic occupied by the disabled vehicle, and one at the traffic side of the vehicle approximately ten feet rearward or forward thereof. As an alternative to the use of flares or lanterns, three portable reflector units of a type approved by the Department may be used in the same manner.

Nation admitted that no flare pots or red lanterns were set out. (pp. 92-93.) He claimed, however, that he put out two round reflectors about 100 yards from each end of the Zektzer truck. (p. 92.) Even if his testimony were accepted, he failed to comply with the statute (sec. 66-182a) which requires a third reflector, flare pot or lantern to be placed at the traffic side of the vehicle about ten feet from the rear or front of it. But Nation's testimony was contradicted by Officer Cochran who determined that there was no other type of warning other than fusees at the place of the accident. (p. 68.) Nation did not mention to

Officer Cochran anything about putting out reflectors. Further, there was no showing made that the alleged reflectors were of the proper type.

Nation also claimed that he put out two fusees on the shoulder of the highway, one about 100 yards to the west of the Zektzer truck and the other about 100 yards to the east thereof. No fusee was placed to the side of the Zektzer truck. (p. 91.) Again, Nation's testimony was contradicted. He admitted that the fusee burning to the east of the accident scene when Officer Cochran arrived was not there when the accident occurred. (pp. 66-67.) He claimed that the fusee originally put out had been run over by the Buick or another car (pp. 66-67), but the officer searched the area and could not find any damaged fusee (p. 67).

Under the evidence, it is submitted that a finding of violation of Section 66-182a would be justified. In fact, the evidence supports the conclusion that there was no warning signal *of any kind* either to the east of the trucks or alongside them. (*Osterode v. Almquist* (1948), 89 Cal. App. 2d 15, 18, 200 P.2d 169.)

The argument made by appellants in this respect is ingenious, but contradictory. It is claimed, on the one hand, that Section 66-182a (dealing with flares, etc.) is inapplicable because the tow truck was not "disabled" within the meaning of the statute. (Appellants' Brief, p. 17.) On the other hand, it is argued that Section 66-171(a) (relating to stopping on the highway) is also inapplicable because the tow truck was engaged in assisting a disabled vehicle. (Appellants' Brief, pp. 14-16.) The two arguments are mu-

tually destructive. The only statutory exception to the provisions of Section 66-171(a) is that set forth in subsection (b) thereof, as follows:

> "This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

If the tow truck comes within the intent and meaning of a "vehicle which is disabled . . . in such a manner and to such extent that it is impossible to avoid stopping and temporarily leaving" it on the highway (Section 66-171(b)), then it must necessarily also come under the category of "any motor truck" which "is disabled upon the traveled portion of any highway or the shoulder thereof . . ." (Section 66-182a(a)). Otherwise stated, if the tow truck was entitled to stop on the highway pursuant to the exception embodied in subsection (b) of Section 66-171, then it should reasonably follow that the tow truck operator is subject to the requirements of Section 66-182a relative to the display of warning signals.

It may be assumed that the driver of a tow truck may not violate the intent of Section 66-171(a) in stopping on the highway under special circumstances, as where there is an emergency and no other means of making the tow are available, but no such showing was made here.

B. There is ample evidence which supports the finding that defendant Nation was negligent irrespective of statutory violations.

The general rule is stated in 30 A.L.R. 2d 1019, 1025, as follows:

> "Since towing ordinarily is the only way or the most practical way of getting a motor vehicle which is disabled or not operating under its own power to the desired destination, the presence of the towing and towed vehicles on the highway for that purpose is not negligence per se; but the towing operation requires the exercise of that care which ordinarily prudent persons would exercise under the existing conditions or circumstances, or commensurate with the known or reasonably foreseeable dangers incident to the operation."

If the towing operation involves an obstruction of the highway, the operator must use the care which a reasonably prudent person would exercise while engaged in that operation, with its known and reasonably foreseeable hazards. (Annotation, 30 A.L.R. 2d 1019, 1025.) The tow truck operator may be found negligent in failing to maintain and use an effective lighting system or equipment. (Annotation, 30 A.L.R. 2d 1019, 1027.) Further (30 A.L.R. 2d 1019, 1028):

> "The use or misuse of headlights during a towing operation in such a manner that it is made to appear to an approaching motorist that there is merely a lighted vehicle coming toward him, calculated to induce him to pass without warning that there is an obstruction behind the lights in addition to the vehicle to which they belong, may constitute negligence and result in liability for

damage due to collision with such obstruction in attempted passage."

In *Goodman v. Keeshin Motor Express Co.* (1934), 278 Ill.App. 227, the defendant's truck, headed west, became mired after its right wheels went onto the shoulder of the road. The driver of a cattle truck, headed east, undertook to tow defendant's truck eastward by fastening the rear of the cattle truck to the rear of defendant's truck. The plaintiff approached from the east, going west, and, seeing the cattle truck lights, attempted to pass on the right and ran into defendant's truck. In holding that the questions of negligence and contributory negligence were for the jury to determine, the Court stated (278 Ill.App. 227, at 231):

"The situation presented a kind of trap for any vehicle approaching from the east."

And further:

". . . the situation was one well calculated to mislead the driver of a westbound automobile into believing that he could pass the cattle truck to the right with safety. He would not know of the presence of the defendant's truck until too late to avoid a collision. *Defendant driver should at least have sent his helper eastward to warn any automobiles coming from the east of the conditions, and the jury could properly consider his failure to do this as negligence.*" (Emphasis added.)

Here, also, a man was present (Zektzer) who could have been sent down the road to warn vehicles coming

from the east of the danger, and the District Court could properly consider Nation's failure to do so as negligence.

Under somewhat similar circumstances, the driver of the towing vehicle was found to be negligent in *Smith v. Litton* (1950, La.App.), 47 So.2d 411, although there was a person sent out on the highway to warn approaching traffic.* The Louisiana Court held that (p. 413):

> "Defendant Litton was negligent in having no flares placed out to warn traffic approaching the scene of the towing operation. The Litton truck obstructed its left (south) side of the road and its headlights were pointed in a southwesterly direction. . . . Litton was further negligent in placing his truck on its left side of the highway and creating a situation where the driver of an oncoming car might logically be misled in the darkness by the unusual situation of having a car blocking the south side of the highway, but with its lights pointing westward."

See also,

Osterode v. Almquist, supra, 89 Cal.App.2d 15, 18, 200 P.2d 169.

Considering the case as a whole, it is submitted that the District Court was entitled to find, *as a fact,* that the defendant Nation was negligent in unnecessarily blocking the westbound lane of the highway in

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*For this reason and because the vehicle being towed was in front of the towing vehicle and visible under its headlights, the plaintiff's driver also was found to be negligent. Neither circumstance was present here, and, in any event, the Louisiana court simply affirmed the judgment.

such a manner as to create a "trap" and without placing proper or adequate warning lights or signals upon the highway, and in failing to use his headlights properly, and in failing to use his boom lights in such a manner as to indicate the position of the tow truck on the highway, and in failing to send Zektzer down the highway to warn approaching westbound vehicles, and in failing to move off the highway when he saw the decedents' Buick approaching and realized that the driver thereof apparently was unaware of the danger.

The position assumed by the appellants must necessarily be that, *as a matter of law,* there was no evidence which would support a finding of negligence on the part of Nation. But the cases cited by them do not sustain that position. There were different facts in each such case and in none of the cited cases did it appear that the appellate Court decided the negligence and contributory negligence questions as questions of law.

For example, in *Kastler v. Tures, supra,* 199 Wisc. 120, 210 N.W. 415, the jury returned a special verdict for the plaintiff (operator of the service car), but the trial Court granted what was in effect a judgment notwithstanding the verdict in favor of the defendant (operator of the vehicle which ran into the service car). The service car had its headlights on and there was a man on the highway waving a flashlight. It was admitted that there was ample room for cars going in either direction to pass on the highway. In reversing the judgment notwithstanding the verdict, the Wis-

consin Court simply held that the issues of negligence, contributory negligence and proximate cause were for the jury and should not have been decided as issues of law. That such was the decision is shown by the Court's statements with reference to the facts which the jury was entitled to find. (210 N.W. at 417.)

What was implicit in the decision in the *Kastler* case was made explicit by the Court in *Henry v. S. Liebovitz & Sons* (1933) 312 Pa. 397, 167 A. 304, also cited by appellants. Judgment for the plaintiff was reversed because of an error in the instructions, but the Court stated (167 A. at 304):

> "As a new trial must be granted, we shall not discuss appellant's contention that its motion for judgment n.o.v. should have been allowed for want of negligence and because decedent's negligence contributed. We are satisfied that, on the record presented, *those questions were for the jury.*" (Emphasis added.)

It may be noted also that, in referring to the statute dealing with stopping on the highway, the Court predicated its discussion upon the assumption that the towing operation "required" the temporary use of the highway. (167 A. at 305.)

Appellants also cited *Bowmaster v. William H. De Pree Co.* (1932), 258 Mich. 538, 242 N.W. 755, but an entirely different accident was involved there. The De Pree truck was stopped on the highway with its lights on. Decedent, also driving a truck, saw the De Pree truck and stopped on the highway about fif-

teen to twenty feet in front of it in such a manner as to block the view of the lights of the De Pree truck. There was no reason for the decedent to leave his truck on the highway in such a manner. The defendant Van Ark then came along and hit decedent's truck. The Michigan Court recognized that the situation might have been different if the decedent had been misled by the position of the De Pree truck. Thus, it was said (242 N.W. at 744):

> "But the plaintiff insists that they were negligent in parking their truck on the wrong side of the road so that it was facing west directly in the way of traffic coming from that direction. There would be some merit in this contention if decedent had been misled by the position of the truck and had driven off the south side of the road in the belief that the truck was coming toward him on the north side. But the accident did not happen in that way."

Again, the Michigan Court did not decide the case as a matter of law, but it simply affirmed the judgment.

In *McNair v. Berger* (1932), 94 Mont. 441, 15 P. 2d 834, the wrecker had its headlights on and there was a spread light between them. There was ample room on the paved part of the highway to allow cars to pass it. The Court also recognized that the question of defendant's negligence is generally for the jury (15 P. 2d at 836), and the judgment was affirmed.

III

CONTRIBUTORY NEGLIGENCE WAS AT LEAST A QUESTION OF FACT.

A. Appellants failed to sustain their burden of pleading and proving contributory negligence.

Appellants' answers to the complaints in each case alleged, as an affirmative defense, that any injuries or damages resulting from the accident "were solely caused or contributed to by the gross and wanton negligence of General Grant Greer, Jr." (pp. 13-14, 16.) There was no allegation in either answer that Mrs. Greer was negligent in any way or that any alleged negligence of Mr. Greer should or could be imputed to her for any reason.

The defense so raised by appellants was an affirmative one and they had the burden of proving it. (*Pearson & Dickerson Contractors, Inc. v. Harrington, supra,* 60 Ariz. 354, 137 P. 2d 237, 239-240.) But appellants concede that there is no "direct evidence as to who was driving the Buick automobile." (Appellants' Brief, p. 20.) Appellants refer to the "driver of the Buick, whoever it may have been" (Appellants' Brief, p. 20), and they advance several arguments on the "assumption" that Mr. Greer was driving the Buick. (Appellants' Brief, pp. 27, 31.) Appellants, therefore, have admitted that the affirmative defense raised by them was not proved by "direct evidence," but is, on the contrary, founded upon an "assumption." It necessarily follows that appellants failed to sustain their burden of proving by a preponderance of the evidence that Mr. Greer was guilty

of negligence. If he were a guest in the car, the negligence, if any, of the driver thereof could not be imputed to him in the absence of pleading and proof of a joint enterprise wherein he had a joint right of control over the driving of the car. (*Salt River etc. Association v. Green, supra,* 56 Ariz. 22, 104 P. 2d 162, 164.)

Appellants claim, however, that "the undertaking was a joint enterprise and each of the Greers had equal interests and rights in the conduct of the trip and in the control of the automobile" (Appellants' Brief, p. 32), that the alleged negligence of Mr. Greer should be imputed to Mrs. Greer, and that Mrs. Greer was independently negligent. (Appellants' Brief, pp. 33-34.) This argument is made for the first time on appeal. The answers do not allege a joint venture nor was any claim made in the answers that Mrs. Greer was guilty of any personal negligence. The sole affirmative defense of this character raised by the answers was the defense that the sole cause of the accident was the alleged negligence of Mr. Greer. (pp. 13-14, 16.)

Neither is there any evidence that "the undertaking was a joint enterprise" or that "each of the Greers had equal interests and rights in the conduct of the trip and in the control of the automobile". In fact, appellants frankly concede that joint enterprise was not proved, for they state (Appellants' Brief, p. 31):

> "General Grant Greer, Jr., and Rubby Greer, were traveling in a Buick car owned by the United Church of God in Christ. The record does not disclose whether one or both arranged to, and bor-

rowed the car. It does not disclose the purpose of their venture, or whether both shared the driving responsibilities."

It may be added that the record does not show which of the Greers was the driver and which was the passenger, or whether the passenger was awake or asleep, or whether the passenger was in any position to observe the road, or any other facts relative to a claim of joint control or personal negligence on the part of the passenger. In the absence of *both* pleading and proof of such facts, there was no basis for any finding in favor of defendants relative to such affirmative defenses. (*Melville v. State of Maryland* (1946, 4th Cir.), 155 F. 2d 440, 443; see Restatement, Torts, sec. 491, comment c.) Alleged negligence of a driver cannot be imputed to a guest or passenger unless the latter had the right to control the operation of the vehicle, and the burden of proving such control was upon the defendants. (*Kocher v. Creston Transfer Co.* (1948, 3rd Cir.), 166 F. 2d 680, 684-687.) The mere fact that the driver and guest are husband and wife, or vice versa, does not alter the rule; a joint right of control must still be shown. (*Weller v. Fish Transport Co.* (1937), 123 Conn. 49, 54, 192 A. 317, 320; *Chandler v. Dugan,* 70 Wyo. 439, 251 P. 2d 580, 586; see, also, *Trefzer v. Stiles* (1952), 56 N.M. 296, 243 P.2d 605, 607.)

B. In any event, the evidence does not show that the driver of the Buick was guilty of contributory negligence as a matter of law.

As already has been shown, the defense of contributory negligence is ordinarily a question of fact and in Arizona that defense is a question of fact "in all cases whatsoever". (Ariz. Const., art. 18, sec. 5.) Moreover, the District Court had ample reason for finding, as a fact, that the defendants had failed to sustain their burden of proving the affirmative defense alleged.

As held in *Winder & Son, Inc. v. Blaine, supra,* 218 Ind. 68, 29 N.E. 2d 987, 989, the driver of the Buick had a right to assume that there would not be a truck stopped on the highway without headlights and without the warning signals required by law.

Furthermore, the District Court, as the trier of fact, could find that the driver of the Buick was suddenly and unexpectedly confronted with the lights of defendant's truck as the Buick came up the hill, passed the knoll and rounded the curve and that such driver could not determine at first whether the lights were from an approaching vehicle or from one standing on the wrong side of the road. (See *St. Johnbury Trucking Co. v. Rollins, supra,* 145 Me. 217, 74 A. 2d 465, 467.) As stated in *Goodman v. Keeshin Motor Express Co.* (1934), 278 Ill. App. 227, 231:

> "The situation preesnted a kind of trap for any vehicle approaching from the east."

Under such circumstances, it was not contributory negligence as a matter of law for the Buick driver to

keep to the right in order to pass the tow truck on the right for he was required by law to do so. (Arizona Code Annotated, 1939, 1952 Supplement, secs. 66-163, 66-163a.) Such driver had a right to assume, until the contrary appeared, that the tow truck would not be on the wrong side of the highway on a curve in violation of the statute. (Arizona Code Annotated, 1939, 1952 Supplement, sec. 66-163e.)

Appellants argue as though the trial Court was compelled to accept wholly the testimony of defendant Nation, notwithstanding the contradictions therein. But there were many reasons why the trial Court could reject that testimony. The trier of fact could consider, for example, the fact that it is highly unlikely that Nation could have watched the headlights of the Buick at a distance of a half mile or so and determined its speed "within a matter of a second." (p. 96.) The trial Court could also find that it was impossible to judge the speed of a car at a distance of a half mile, at night, by the sound of its tires. (p. 136.) Indeed, the Court reasonably could find that Nation did not hear the sound of the tires at all, for his motor and winch were running and making noise and Nation was sitting in the cab. (p. 140.)

The trial Court could also take into consideration the fact that Nation admitted to false testimony. At the coroner's inquest Nation testified that he first saw the Buick when it was only 150 yards away (pp. 106-107; see Exhibit 20 at page 17 thereof), while at the trial he claimed that he saw the Buick when it was a half mile to three fourths of a mile away.

(p. 96.) Nation never explained this enormous change in testimony, although he had ample opportunity to do so. Hence, the trial Court was justified in rejecting his testimony. (*Andruss v. Nieto, supra,* 112 F. 2d 250, 252.)

In finding that excessive speed had not been established by a preponderance of the evidence, the trial Court could further rely upon the fact that the Buick had been averaging only 47 miles per hour during the last 274 miles. (p. 145.) A considerable portion of this distance must have been covered during the daytime since the Buick left the check point at the New Mexico border at about 4:25 P.M. (p. 131.) There is no *prima facie* speed limit on state highways in Arizona except at nighttime, which is defined as the time between a half hour after sunset to a half hour before sunrise. (Arizona Code Annotated, 1939, 1952 Supplement, sec. 66-157a.) There was no evidence that the Buick stopped anywhere along the way, and it passed through only four or five towns, most of which were mere villages.

Other facts which the trial Court could take into consideration were these: The tow truck was stopped on the highway at a curve. (pp. 67-68.) As a vehicle approached from the east, a knoll about fifteen feet high on the right side would obstruct the view. (pp. 53, 67.) The driver of the Buick could not have seen the truck equipment at all from a distance of a quarter mile away until he or she was within 150 yards of it. (pp. 83-84.) The tow truck had only its parking lights on (pp. 97-107), and it was in such a posi-

tion as to block or obstruct the view of the Zektzer truck. There was evidence that neither the lights on the Zektzer equipment nor the boom lights on the tow truck were burning. (pp. 77, 84.) Nation's testimony that he had put out a fusee to the east of the scene, which fusee was run over by the Buick or another car, was shown to be false (p. 67), or at least the trial Court could so find. Officer Cochran determined that, other than the fusees put out after the accident, there was no other type of warning at the scene of the accident. (p. 68.)

Finally, even if it were found that the Buick was traveling at an excessive rate of speed, such fact would not establish contributory negligence unless such rate of speed was a proximate cause of the accident, and that ordinarily presents a question of fact. (See, e.g., *Butane Corporation v. Kirby, supra,* 66 Ariz. 272, 187 P. 2d 325, 330; *McIver v. Allen,* 33 Ariz. 28, 262 P. 5; *Marchese v. Methany,* 23 Ariz. 333, 203 P. 567.) The District Court could consider the fact that the driver of the Buick kept to the right, attempting to pass the tow truck on the right, and was obviously deceived by the situation created by the defendant Nation. (See *Hatch v. Daniels,* 96 Vt. 89, 117 A. 105.)

Appellants' argument seems to be that the Greers, parents of seven minor children, deliberately ran into the Zektzer truck, thereby committing suicide. But, as stated in 20 Am. Jur. 214:

> "One is presumed to give heed to instincts of safety and self-preservation."

And (20 Am. Jur. 215):

> "Ordinarily, the presumption which the law indulges in this regard is that one will take ordinary care of his person and property. This rule is especially applicable to actions for wrongful death."

The presumption that a person acts for his own safety is a part of the common law. (*State of Utah v. Busby* (1942), 102 Utah 416, 131 P. 2d 510, 512.) It is founded on a law of nature—the universal instinct of self-preservation. (*Baltimore & P.R. Co. v. Landrigan* (1903), 191 U.S. 461, 474, 48 L.Ed. 262, 267, 24 S.Ct. 137.)

C. The evidence would support a finding that the last clear chance doctrine was applicable.

The rule of last clear chance applies in Arizona both in cases where the defendant saw the plaintiff's peril and where, in the exercise of reasonable care, he would have been the plaintiff's peril. (*Casey v. Marshall* (1946), 64 Ariz. 232, 168 P. 2d 240, and 64 Ariz. 260, 169 P. 2d 84, 85.)

If it is found that the elements comprising the last clear chance rule are present, then it must necessarily be further found that the defense of contributory negligence has not been established. (See, e.g., the instruction approved in *Root v. Pacific Greyhound Lines* (1948), 84 Cal. App. 2d 135, 137, 190 P. 2d 48, and the discussion in *Girdner v. Union Oil Co.* (1932), 216 Cal. 197, 202, 13 P. 2d 915.)

Since any negligence of a plaintiff or decedent is not a proximate cause of the accident in last clear chance cases, it is immaterial in such cases whether or not it may be said that his negligence continues up to the very point of collision. (*Peterson v. Burkhalter* (1951), 38 Cal. 2d 107, 111, 237 P. 2d 977; *Selinsky v. Olsen* (1951), 38 Cal. 2d 102, 104-105, 237 P. 2d 645; *Bragg v. Smith* (1948), 87 Cal. App. 2d 11, 14, 195 P. 2d 546.)

The following testimony of the defendant Nation shows that the last clear chance rule is applicable (pp. 104-105):

"Q. Now, it was at that point when you observed this car coming at 100 miles an hour, about half a mile away, that you commenced to flash your headlights on and off, right?

A. Yes, sir.

Q. And I take it the reason you did that was that you felt that you should try to warn him?

A. Yes, sir; he was not slowing up.

Q. He was not slowing up. *And I take it from your observation he was completely unaware of the danger he had gotten himself into, right?*

A. *Yes, sir.*

Q. Now, at that time, you were seated behind the steering wheel of your car?

A. Yes, sir.

Q. And your motor was running?

A. Yes, sir.

Q. And did you continue to blink your lights?

A. Yes, sir.

Q. And blinked them right up until the impact with your tow truck?

A. Blinked them until just before the impact."

Nation further testified (p. 142):

"Q. And your estimation of the time that elapsed from the time that you first noticed this danger until this accident occurred was approximately twenty seconds?

A. Somewhere around there, yes.

Q. It could have been a little more, right?

A. Could have been; I am not sure.

Q. So that I understand you, having watched the Buick approach all the time when it was, say, oh, 2,300 feet away, you still saw it still going a hundred miles an hour, right?

A. Right.

Q. And the same when it was 2,000 feet away?

A. Yes, sir.

Q. And 1,700 feet away?

A. I didn't see any change at all.

Q. So from the entire time you saw it, you observed it constantly, and until the time it approached you, you observed it was not changing its speed in any way, correct?

A. That is right, sir."

Nation also testified as follows (p. 103):

"Q. Therefore, it is a fair statement, is it not, to say that from the time you observed this car approaching you a half a mile away at 100 miles an hour, you made no attempt of any kind or character to back up your tow truck off the highway, did you?

A. No, sir."

Subsequently, after the noon recess and after other witnesses had testified, the defendant Nation was recalled as a witness by his own counsel. He then

claimed that he did not have time to move after he saw there was trouble because he would have had to get out of his truck to disengage the winch. (p. 136.) He claimed that he could not back up when the winch was running because the gears would lock up and lock the back wheels. (p. 141.) But the trial Court was not compelled to accept Nation's belated attempt to excuse his conduct. In the first place, Nation testified in his deposition that he did not back up because he "was afraid to move." (Deposition of Nation, p. 48, being Exhibit 22.) Secondly, Nation had previously stated at the trial that he put his foot on the brake to keep the truck from rolling back while the winch was operating. (pp. 93-94.) Thirdly, when Nation was examined by plaintiff's counsel concerning the fact that he did not attempt to move after noticing the danger, he made no mention of any such excuse. (p. 103.) In the fourth place, in attempting to explain how he could hear the sound of the Buick's tires, Nation testified that he "stopped the winch" so that the noise died down. (p. 143.) Finally, Zektzer was present and no reason was given as to why he could not have either operated the winch lever or gone out on the highway to warn the approaching car.

Under these circumstances, it is submitted that the application of last clear chance was a factual question to be resolved by the trial Court.

D. The evidence would support a finding that Nation's conduct was wilful and wanton.

As has been shown, the evidence does not establish that it was necessary for Nation to block the west-

bound lane in order to conduct his winching operation. He already had made an unsuccessful attempt to pull the truck uphill from the front and, in doing so, he did not block the highway. No explanation was given for his position on the highway in winching the Zektzer truck from the rear. If, as the trial Court was entitled to find, the defendant Nation intentionally and unnecessarily stopped on the highway at night on a curve and behind a knoll and in such a manner as completely to obstruct the westbound lane, without adequate warning signals, and if, as Nation himself claimed, the nature of his winching operation was such that he could not move off the highway when he saw a car approaching a half mile to three fourths of a mile away, then a finding of wilful and wanton misconduct on the part of Nation is justified by the evidence. Under such circumstances, the trial Court could reasonably find that Nation's conduct "was a wanton disregard of the rights and safety of the traveling public." (*St. Johnbury Trucking Co. v. Rollins, supra,* 145 Me. 311, 74 A. 2d 465, 466; see, also, *Alabam Freight Lines v. Phoenix Bakery* (1946) 64 Ariz. 101, 166 P. 2d 816, 819; Restatement, Torts, sec. 500.)

And where the defendant's conduct is wilful and wanton, contributory negligence is not a defense. (*Womack v. Preach,* 64 Ariz. 61, 163 P. 2d 280, 283, 165 P. 2d 657, 659.)

CONCLUSION.

We submit that the questions of negligence and contributory negligence were no more than factual ones which were properly determined by the trial Court and that, there being no substantial question of law presented, the judgments should be affirmed.

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Respectfully submitted,

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